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Submitted Via FOIA Online:

<https://www.foiaonline.gov/foiaonline/action/public/request>

And Via Electronic Mail to:

Kercheval.Stephanie@epa.gov

November 2, 2018

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Ms. Stephanie Kercheval
Regional Freedom of Information Officer
U.S. EPA, Region 10
Office of Ecosystems, Tribal and Public Affairs
1200 6th Avenue ETPA-124
Seattle, WA 98101

RE: Request for public records pursuant to the Freedom of Information Act

Dear FOIA Officers:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 551 *et seq.*, the Northwest Environmental Defense Center ("NEDC") respectfully requests records held by the United States Environmental Protection Agency ("EPA") in either the headquarters office or the offices of Region 10 that pertain to EPA's interpretation and application of the RCRA regulation at 40 C.F.R. § 261.6(a)(3)(iv)(C), which states in pertinent part:

(a)(3) The following recyclable materials are not subject to regulation under parts 262 through parts 268, 270 or 124 of this chapter, and are not subject to the notification requirements of section 3010 of RCRA:

(iv)(C) Oil reclaimed from oil-bearing hazardous wastes from petroleum refining, production, and transportation practices, which reclaimed oil is burned as a fuel without reintroduction to a refining process, so long as the reclaimed oil meets the used oil fuel specification under § 279.11 of this chapter.”

40 C.F.R. § 261.6(a)(3)(iv)(C). In particular, and as further described below, NEDC seeks records related to the application of that regulatory provision both nationwide (as a matter of EPA policy) and within the State of Oregon, as applied to an organic recycling unit installed and operated by Chemical Waste Management of the Northwest, Inc. in Arlington, Oregon.

A. Documents Requested from EPA Headquarters:

1. All documents reflecting EPA’s interpretation of 40 C.F.R. § 261.6(a)(3)(iv)(C) as applied to thermal treatment devices that that heat oil-bearing hazardous waste to vaporize, remove, and separate organic constituent materials from the recycled oil and other solids.

B. Documents Requested from EPA Region 10:

2. All documents reflecting EPA’s interpretation of 40 C.F.R. § 261.6(a)(3)(iv)(C) as applied to thermal treatment devices that that heat oil-bearing hazardous waste to vaporize, remove, and separate organic constituent materials from the recycled oil and other solids.
3. All documents relating to or reflecting whether EPA Region 10 concurs with the following statement, quoted from a letter sent from John Blevins, EPA Region 6, to Mr. Mr. J.D. Head, of Fritz, Byrne, Head & Fitzpatrick, PLLC (May 2, 2016), a copy of which is attached hereto and incorporated into this FOIA request:

If a [thermal desorption unit] combusts all or a portion of the vent gas, combustion of the TDU vent gas from RCRA hazardous waste or recyclable materials [40 C.F.R. § 261.6(a)(1)] is considered thermal treatment that is regulated by RCRA. Heating hazardous wastes to a gaseous state is subject to regulation under RCRA as treatment of

hazardous waste, and thermal treatment after a material becomes a hazardous waste is fully regulated under RCRA.

4. All documents relating to or reflecting whether EPA Region 10 concurs with Oregon Department of Environmental Quality ("ODEQ") that "if feed stock to [a thermal treatment device] is limited to oil bearing hazardous waste from petroleum refining, production and transportation practices and the reclaimed oil is burned as a fuel, the unit would be a recycling unit and the construction and operation of it is allowable without [a hazardous waste] permit modification." *See* Letter from Elizabeth A. Druback, ODEQ, to James L. Denson Jr., Chemical Waste Management of the Northwest, Inc. (March 24, 2017), a copy of which is attached hereto and incorporated into this FOIA request.
5. All documents related to Oregon Department of Environmental Quality's ("ODEQ") proposal to grant a permit modification request to Chemical Waste Management of the Northwest, Inc. to operate a new organic recycling unit ("ORU-2") as a "recycling unit" and incorporate 22 new permitted hazardous waste tanks into the permit. *See* ODEQ Public Notice, Class 3 Permit Modification for Chemical Waste Management of the Northwest (July 20, 2018), a copy of which is attached hereto and incorporated into this FOIA request.
6. All documents relating to the RCRA regulation, permitting, or compliance status of the organic recycling unit identified as "ORU-2" and its associated storage tanks located at the hazardous waste treatment, storage, and disposal facility owned and operated by Chemical Waste Management of the Northwest, Inc., located at 17629 Cedar Springs Lane in Arlington, Oregon.

This request encompasses all records, no matter the form, and includes, but is not limited to: documents, files (and their contents), photographs, video, surveys, reports, memoranda, applications, letters, notices, notes (electronic, handwritten, or otherwise), meeting minutes, graphs, charts, maps, spreadsheets, correspondence, email messages, data and electronic files. It also encompasses any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, may include any information not contained in the original record.

C. Request for Fee Waiver

NEDC requests that EPA waive all fees in connection with this request. NEDC is a 501(c)(3) non-profit corporation registered in the state of Oregon and was founded in 1969. NEDC is dedicated to the protection and restoration of the environment and

natural resources of the Pacific Northwest. Our members live, work, visit, and engage in recreational activities throughout the state, including the Columbia River gorge and other areas near Chemical Waste Management's Arlington, Oregon facility. NEDC works to educate its members and the general public about activities affecting Oregon's environment, natural resources, and public health, including hazardous waste management activities that may affect air and water quality and public health. NEDC's work involves ensuring that state and federal regulatory agencies meet their legal obligations when considering projects that may have detrimental environmental impacts.

FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit, public interest groups like NEDC access to government documents without the payment of fees. The federal courts have stated that the statute "is to be liberally construed *in favor of waivers* for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy))(emphasis added).

As shown below, NEDC satisfies FOIA's two-pronged test for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii); *see* 40 C.F.R. § 2.107(l). Under FOIA and the EPA's implementing regulations, the fee associated with the document production is waived if the release of the information is in the "public interest." 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . [when it is determined that] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of [the Corps] and is not primarily in the commercial interest of the requester."); 40 C.F.R. § 2.107(l). Here, disclosure of the requested records is: (1) in the public interest, and (2) is not in the commercial interest of NEDC.

1. Disclosure of the information sought by this FOIA request is in the public interest because furnishing the information will contribute significantly to public understanding of the operations or activities of the EPA.

NEDC satisfies the first criterion for the fee waiver because the requested information will contribute significantly to the public understanding of the operations or activities of the EPA. NEDC, which is generally recognized as an established expert in the field of environmental protection and regulatory compliance, possesses the ability to disseminate the requested information to the general public.

- a. The subject matter of the request concerns the operations and activities of the Corps (40 C.F.R. § 2.107(l)(2)(i)).

The information requested concerns the operations and activities of the EPA. Any documents relating to the EPA's implementation of the RCRA recycled oil exemption cited in the FOIA request and its associated assessment of the hazardous waste permit for the Arlington Facility will provide insight into the manner in which the EPA is carrying out its duties under federal laws and regulations.

- b. The information to be disclosed has important informative value because it is meaningful and will inform the public of the operations or activities of the EPA (40 C.F.R. § 2.107(l)(2)(ii)).

Disclosure of this information will meaningfully contribute to the public understanding of EPA's operations and activities as they relate to the implementation of RCRA's oil recycling exemption and the application of that exemption to the Arlington Facility. NEDC has long-standing interests in the protection of air, water, and land resources in Oregon and the Pacific Northwest, including participating in legal actions seeking to enforce RCRA and participating in hazardous waste permitting decisions in Oregon. As a result, the NEDC has developed significant expertise on those issues, and has also developed an extensive network of members, associates, and professional colleagues across the Pacific Northwest who are interested and actively engaged in protecting air, land, and resources from harm caused by improper hazardous waste treatment practices.

The Arlington Facility, and ODEQ's pending permitting decision, has already garnered significant public attention. *See* OPB, *A Dispute Is Brewing Over Mercury Air Pollution Along The Columbia River* (Aug. 23, 2018)¹; Portland Tribune, *Regulators don't have a handle on toxic emissions from waste plant* (Aug. 28, 2018).² In light of the controversy and media attention, there is already an audience (including but not limited to NEDC members) eager for more information on the threats to air, land, and water resources and public health from the operation of the Arlington Facility and the apparent failure of ODEQ to properly regulate it under its RCRA permitting program. Furthermore, the requested information subject to this FOIA request is not already available to the public. Therefore, using the various resources for analyzing and disseminating the information discussed below, NEDC will again act as a conduit providing access to this information sought by the general public.

¹ <https://www.opb.org/news/article/pollution-competitors-hazardous-tribes-environmentalists/>.

² <https://portlandtribune.com/pt/9-news/404464-301942-regulators-dont-have-a-handle-on-toxic-emissions-from-waste-plant>.

- c. The disclosure of this information will contribute to the general public's understanding of the operations and activities of the EPA (40 C.F.R. § 2.107(l)(2)(iii)).

NEDC will use this information to contribute to the public understanding of how the EPA meets its oversight obligations with respect to ODEQ's RCRA hazardous waste permitting program. Information that could "support oversight of [an agency's] operations" is precisely the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. NEDC, long known for its leadership role and expertise in natural resource issues, uses a combination of education, research, advocacy, and litigation to advance its mission of informing the public on how the government is undertaking to protect natural resources and the environment.

NEDC intends to use the requested records to examine how the EPA is meeting its obligations to protect natural resources and public health in Oregon and to supervise ODEQ's delegated RCRA permitting program. After reviewing the information provided, NEDC intends to use its resources and expertise to inform and educate the public regarding the effect of the EPA's implementation and enforcement of RCRA on Oregon's natural resources and public health. This information may be disseminated to our members and supporters through, variously, our website, Facebook page, electronic media updates, printed newsletter, public comments or testimony on ODEQ permitting actions, and other advocacy work, all of which are available free of charge to interested parties. NEDC will also make the requested information available free of charge to any member of the public that requests it from NEDC.

- d. The disclosure will significantly enhance the public's understanding of EPA's operations or activities (40 C.F.R. § 2.107(l)(2)(iv)).

The disclosure of this information is of wide public interest and will be unique in contributing previously unknown facts, thereby enhancing public knowledge of the EPA's operations or activities. Public oversight and enhanced understanding of the EPA's implementation and enforcement of RCRA and its oversight of Oregon's RCRA permitting program is absolutely necessary. NEDC's consistent contribution to the public's understanding of federal agency activities and their effect on the environment, as compared to the level of public understanding prior to disclosure, are well established.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994). NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on natural resources protection, public health, and other issues and as demonstrated above, NEDC is uniquely qualified to disseminate the information to a large cross-section of the population.

2. Obtaining the information is of no commercial interest to NEDC

The second element of the fee waiver analysis concerns the requester’s “commercial interest” in the information. EPA’s FOIA regulations list two factors to consider in determining whether the information is “primarily in the commercial interest of the requester.” The first factor is “the existence and magnitude of a commercial interest.” (40 C.F.R. § 2.107(l)(3)(i)). As a 501(c)(3) nonprofit organization, NEDC has no commercial, trade or profit interest in the material requested. NEDC will neither be paid for nor receive other commercial benefits from its publication or dissemination of the material requested.

The regulations’ second factor evaluates “the primary interest in the disclosure.” (40 C.F.R. § 2.107(l)(3)(ii)). Clearly, there is great public interest in the release of the materials sought because they will allow for a more thorough analysis of how EPA implements RCRA and is supervising ODEQ’s hazardous waste program. Thus, even assuming, *arguendo*, that NEDC had some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because NEDC’s primary interest in the material is to inform the public about the operations and activities of the EPA. Therefore, the disclosure of the information is not “primarily in the commercial interest of” NEDC and a fee waiver is appropriate.

C. Request for Explanation of Exempted and Nonexistent Documents

Please include in your response an explanation and accounting of which documents, if any, may be privileged or exempt from this FOIA request and why. If you claim that the records should not be disclosed, please justify your determination by referring to the specific exemption that you are invoking under the FOIA. Also, please provide those portions of documents with information requested that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response.

D. Conclusion

As provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the implementing regulations, please provide a written response to this request within ten business days of receipt. Thank you for your time and attention in this matter, and I look forward to hearing from you shortly. If you have any questions, feel free to contact me at (503) 768-6929.

Sincerely,

A handwritten signature in black ink, appearing to read "James N. Saul".

James N. Saul
Clinical Professor and Staff Attorney

cc (via Electronic Mail):

Ms. Lisa McArthur
EPA Region 10
McArthur.lisa@epamail.epa.gov



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 Ross Avenue
Dallas, Texas 75202-2733

2 MAY 2016

Mr. J.D. Head
Fritz, Byrne, Head & Fitzpatrick, PLLC
221 West 6th Street
Suite 960
Austin, Texas 78701

Dear Mr. Head:

Thank you for your October 30, 2015 letter requesting clarification of the hazardous waste regulatory standards for thermal desorption units (TDUs) installed at RCRA treatment, storage, and disposal facilities (TSDFs). I apologize for the delay in responding to your request. In your scenario, the TDU reclaims oil from oil bearing hazardous wastes generated by petroleum refining, production, or transportation practices. You describe a TDU as a device that heats solid material to vaporize, remove, and separate organic constituent materials from solids. In the scenario you describe at a TSDF, the separated organic constituents are typically condensed and recovered as a liquid oil. The TDU process also generates a vent gas after the condensing stream.

Your inquiry also references 40 C.F.R. § 261.6(a)(3)(iv)(C)¹, which provides that:

Oil reclaimed from oil-bearing hazardous waste from petroleum refining, production, or transportation practices, which reclaimed oil is burned as a fuel without reintroduction to a refining process, so long as the used oil specification under 40 C.F.R. § 279.11 is not subject to regulation under 40 C.F.R. Parts 262 – 268, 270, or 40 C.F.R. Part 124, and is not subject to the notification requirements of Section 3010 of RCRA.

If the above conditions are met, then the reclaimed oil can be burned as a non-hazardous fuel. If the oil-bearing hazardous waste is not from petroleum refining, production, or transportation practices, then the reclaimed oil is subject to RCRA regulation.

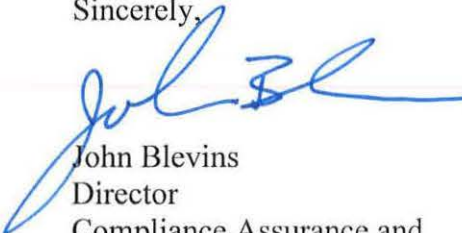
If a TDU combusts all or a portion of the vent gas, combustion of the TDU vent gas from RCRA hazardous waste or recyclable materials [40 C.F.R. § 261.6(a)(1)] is considered thermal treatment that is regulated by RCRA. The material being treated (oil-bearing hazardous waste) is already a hazardous waste. Heating hazardous wastes to a gaseous state is subject to regulation under RCRA as treatment of hazardous waste, and thermal treatment after a material becomes a hazardous waste is fully regulated under RCRA. 54 Fed. Reg. 50968, 50973 (December 11, 1989). Thus, thermal treatment of the vent gas requires a RCRA permit.

¹ Since you did not reference a specific State in which your client may operate a TDU, this letter cites to the applicable federal regulations. If the State has an authorized RCRA program, the corresponding state regulation would be applicable.

If the vent gas is combusted in the combustion chamber of the TDU, then a permit under 40 C.F.R. Part 264, Subpart O is required, because the TDU would meet the definition of incinerator in 40 C.F.R. § 260.10 (an enclosed device that uses controlled flame combustion). If, on the other hand, the vent gas is vented to and combusted in a thermal oxidizing unit (TOU), the permitting authority may be able to permit the entire unit (TDU and TOU) as a miscellaneous unit under 40 C.F.R. Part 264, Subpart X. A RCRA permit would be required even if the facility is operating as a RCRA exempt recycling activity under 40 C.F.R. § 261.6(a)(3)(iv)(C). If the permitting authority decides to issue a 40 C.F.R. Part 264, Subpart X permit, the permitting authority is required to include in the permit requirements from 40 C.F.R. Part 264, Subparts I through O, AA, BB, and CC, 40 C.F.R. Part 270, 40 C.F.R. Part 63, Subpart EEE, and 40 C.F.R. Part 146 that are appropriate for the miscellaneous unit being permitted as required in 40 C.F.R. § 264.601. The decisions as to what appropriate requirements would be included in the permit would be left to the permitting authority. However, EPA would expect that the permit conditions would be similar to those set forth in the enclosed Consent Agreement and Final Order, In Re: US Ecology Texas, Inc. and TD*X Associates, LP, EPA Docket Nos. RCRA-06-2012-0936 and RCRA-06-2012-0937, filed October 4, 2012.

If you have any questions, please feel free to contact Guy Tidmore of my staff at (214) 665-3142 or via e-mail at tidmore.guy@epa.gov.

Sincerely,



John Blevins
Director
Compliance Assurance and
Enforcement Division

Enclosure

Cc: Penny Wilson, ADEQ
Lourdes Iturralde, LDEQ
John Kielling, NMED
Mike Stickney, ODEQ
James Gradney, TCEQ



Oregon

Kate Brown, Governor

Department of Environmental Quality

Eastern Region The Dalles Office

400 East Scenic Drive, Suite 307

The Dalles, OR 97058

(541) 298-7255

FAX (541) 298-7330

TTY 711

March 24, 2017

Mr. James L. Denson Jr.
PNW/BC Environmental Protection Manager
Chemical Waste Management of the Northwest
17629 Cedar Springs Road
Arlington, OR 97812

Re: Use of Newly Constructed Organic Recovery Unit
Concurrence
Chemical Waste Management of the Northwest
ORD #089 452 353

Dear Mr. Denson:

On March 7, 2017, the Department received a regulatory concurrence request from Chemical Waste Management of the Northwest (CWMNW). The request states that the unit will be operated as a recycling unit in accordance with the stipulations specified in 40 CFR 261.6(3)(iv)(C). In addition, all tanks associated with the new unit will be managed in accordance with all applicable hazardous waste generator standards.

The Department concurs that if feed stock to the Organic Recovery Unit is limited to oil bearing hazardous waste from petroleum refining, production and transportation practices and the reclaimed oil is burned as a fuel, the unit would be a recycling unit and the construction and operation of it is allowable without permit modification. The Department has determined that as long as the feed stock is limited to recyclable material listed above, CWMNW is in compliance with all applicable regulatory requirements.

If you have any questions, please contact Dan Duso of my staff at (541) 278-4618.

Sincerely,

Elizabeth A. Druback
Eastern Region Manager,
Solid and Hazardous Waste Programs

cc: Dan Duso; Hazardous Waste Compliance Inspector

Public Hearing

Class 3 Permit Modification for Chemical Waste Management of the Northwest

Comments due: 5 p.m., Wednesday, Aug. 22, 2018

Project location: Chemical Waste Management of the Northwest, Arlington, OR, Gilliam county.

Proposal: On Oct. 23, 2015, Chemical Waste Management of the Northwest, Inc. submitted a Class 3 Permit Modification Request to install and operate a second Organic Recovery Unit (ORU-2) to treat and recycle hazardous waste at their facility in Arlington, OR.

After several iterations, the final scope on the Class 3 PMR was to operate the ORU-2 as a recycling unit and incorporate 22 new permitted hazardous waste tanks into the permit. Changes were made to the Inspection Plan, Standalone Document 3 and the Closure/Post-Closure Plan, Standalone Document 5. New Standalone Document 22 was added to include the operational parameters of the ORU-2 as a recycling unit and new Standalone Document 23 was added containing the design and operation information for the new tank system.

The Department has conducted a thorough review of the information provided in this Class 3 PMR and is prepared to issue tentative decision to approve this PMR. As part of the Class 3 permit modification process, the Department opened a 45-day public comment period on this draft PMR beginning June 1, 2018 and ending July 16, 2018.

The comment period is now extended to the close of the public hearing. In accordance with 40 CFR 124.12(a)(3) the Department has scheduled a public hearing at 5 p.m. on Aug. 22, 2018 at:

The Gronquist Building
11650 Railroad Avenue
Arlington, Oregon

How to comment: Send comments to: David Anderson, DEQ Bend, 475 NE Bellevue Drive, Suite 110, Bend, OR 97701

Email: anderson.david@deq.state.or.us

Fax: 541-388-8283

Where can I get more information? If you have any questions regarding this PMR, please contact: Mr. Richard Duval, DEQ Pendleton, 800 SE Emigrant Ave., Suite 330, Pendleton, OR 97801

Phone: 541-278-4613

Email: duval.rich@deq.state.or.us

or Mr. James Denson, Chemical Waste Management of the Northwest, Inc., 17629 Cedar Springs Lane, Arlington, OR 97812

Phone: 541-454-2030

Email: jdenson@wm.com



State of Oregon
Department of
Environmental
Quality

**Eastern Region
Materials Management
Program**

800 SE Emigrant, #330

Pendleton, OR 97801

Phone: 541-278-4613

800-304-3513

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Contact: Rich Duval

Email:

duval.rich@deq.state.or.us

www.oregon.gov/DEQ

A copy of this permit modification request and draft permit language is available for review by the general public at the DEQ Eastern Region, The Dalles Office, 400 East Scenic Drive, The Dalles Oregon 97058.

The next step: DEQ considers and responds to all comments received and may modify the proposed permit based on comments received.

Alternative formats: Documents can be provided upon request in an alternate format for individuals with disabilities or in a language other than English for people with limited English skills. To request a document in another format or language, call DEQ in Portland at 503-229-5696, or toll-free in Oregon at 1-800-452-4011, ext. 5696; or email deqinfo@deq.state.or.us.